IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1950

No. 672

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1960

No. 672

VI MURPHY, Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO, Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

We do not think that the questions presented by this case are those stated in the petition. In our opinion the first question is too broad and the second presupposes matters which are not present. We, therefore, submit the following.

QUESTION PRESENTED

Is the imposition of a sanction by a state court upon a newspaper reporter for refusal to divulge, upon an order of the court in a judicial proceeding, the source of his information upon which an article he has published was founded when such source is a fact material and relevant to the issue, an unconstitutional restraint upon the freedom of the press under the Fourteenth Amendment?

REASONS FOR DENYING WRIT

We vigorously disagree with the statements in petitioners petition under the heading "REASONS FOR GRANTING THE WRIT." It would seem from what is there said that the decision of the Colorado Supreme Court was something new — a departure from the previous rule. This is not the case as we will hereafter show and as is in effect later conceded in the petition. There is no adjudicated case in a court of review in any jurisdiction in the United States in which there has been accorded to a newspaper reporter the privilege to refuse to divulge the source of his information respecting an article which he has published. It may be that the Colorado Supreme Court is the first state court in which the constitutional question was raised but that question was raised in the case of *Garland v. Torre*, 259 F. (2d) 545 (2d Cir. 1958), and decided adversely to petitioner's contentions and certiorari was denied by this Court, 358 U.S. 910. The rule that, in the absence of statute, the source of the information must be divulged in a judicial proceeding when the court so orders has been in effect in the United States as long as the constitutional provision providing for freedom of the press and under it the press, in at least thirty-eight states, has apparently been able to function without hinderance. As far as we have been able to ascertain no one in all that time until the *Torre* case ever raised the constitutional provision with respect to it.

The statement that "the communication of news to reporters on condition the source not be disclosed is a constant occurrence" is not supported by any evidence and is one of which we do not believe this Court may take judicial notice.

With all due respect to the press it would seem that

it would be very dangerous to accord the protection requested where the information was properly called for in a judicial proceeding. To do so would be to make it possible for an irresponsible newspaper or other publication to publish supposed *facts* of grave import upon mere rumor from an extremely doubtful source or even from the imagination of the reporter without being required to divulge in a judicial proceeding the source from which the information came or the absence of it. Anonymity with respect to *statements of fact* has never been favored in human relations and to accord protection to the press in preserving it from legitimate judicial inquiry is not only unnecessary to the freedom of the press but could result in undesirable consequences.

In answering the remainder of the petition we shall not follow the order or form of petitioner's arguments, but shall state the points upon which we rely with our arguments in support of them. In passing, however, we are impelled to observe that the cases cited in support of the petition are not in point on the question here presented and the texts are without the authority of judicial decision.

ARGUMENT

I

THE QUESTIONS TO PETITIONER WERE MATERIAL, RELEVANT AND ESSENTIAL.

Mr. Gately, the lawyer whose conduct was under investigation, was examined outside of the presence of the witnesses on both sides. He admitted that a copy of the petition, which was the subject of the inquiry, had come into the possession of the Gazette-Telegraph, but stated that this happened when the petitioner here took it from him in the clerk's office at the time he filed it and that he

had not given a copy to anyone else except the opposing attorneys in the case in which it was filed (H. Tr. 42-44).

The petitioner here was afterwards questioned in the presence of Mr. Gately. She admitted that she was the author of the story which appeared in her newspaper. She testified that the original information came from a "news tip" which she received about two days before Gately's petition was filed; that she questioned Gately about it on the afternoon before the petition was filed but he refused to discuss the matter with her (H. Tr. 72-73); and that she had a copy of Gately's petition before her when she wrote the story early in the morning of the day and before it was filed in Court (H. Tr. 79-80). She was asked if Mr. Gately had showed her a copy of the petition on September 1st, the day before it was filed, which question she refused to answer because her answer might lead to the disclosure of a news source and she would "like to stand under the first amendment of the Bill of Rights, which guarantees us freedom of the press." (H. Tr. 74-76, 79). The petitioner here again refused to answer at a subsequent hearing whether Mr. Gately had showed her a copy of the petition at any time prior to filing it in Court and refused to answer for the same reasons (H. Tr. 248-249).

The question as to whether the petitioner here received from Mr. Gately or was shown by him a copy of his petition before it was filed was material and relevant for two reasons — first, because Mr. Gately was charged with giving the petitioner a copy of his petition for the purpose of having its contents published in a newspaper for the purpose of obtaining publicity for himself which he believed would be favorable to him and for the further purpose of bringing disgrace upon the Supreme Court of Colorado and its members; and second, because Mr. Gately

testified that he did not give a copy of his petition to petitioner before it was filed, that she obtained it by taking it from him at the time he filed it, and that the copy she had before the filing did not come from him.

The motives of Mr. Gately in drafting, swearing to and filing the petition were of peculiar significance. Either he was attempting in what he believed to be good faith to obtain justice for his client which the publicity in a newspaper would do nothing to help, or he was attempting to obtain what he thought would be desirable publicity for himself. If he gave a copy of his petition to petitioner in sufficient time before he filed it to enable her to write her story before it was filed, he was by his testimony attempting to deceive the Court and this was a matter of vital importance, especially in a proceeding where his professional conduct was being examined.

In the petition it is conceded on pages 18 and 19 that the answers sought from petitioner were relevant "if it were Gately, or someone acting under his direction, who supplied petitioner with a copy of the petition." This is exactly what the Colorado Supreme Court was endeavoring to ascertain, and more specifically if it was Gately who supplied the copy of his petition. The argument that the elicitation of the information was not essential to the Court's decision, especially in view of the fact that Gately was nevertheless suspended without the obtaining of the information, in our opinion is without force. The Court wanted and was entitled to all material and relevant information and was not obliged to rely upon circumstantial evidence if direct evidence could be obtained. Certainly no one can properly contend that a party or court is not entitled to the fullest quantum of proof. Because some evidence to a fact has been produced does not render addi-

tional evidence of a different kind immaterial or irrelevant. Circumstances in aggravation are always admissible where they may be considered by the court in the imposition of a penalty or sanction or where as here the court was considering a grave step — the suspension of an attorney from practice during the pendency and before the determination of disbarment proceedings. The Court desired the whole truth as to the attorney's conduct and was entitled to it.

II

IN THE ABSENCE OF STATUTE THERE IS NO PRIVILEGE OF NON-DISCLOSURE OF A NEWS SOURCE BY A NEWSPAPER REPORTER.

This has been held in the following cases:

Clein v. State, 52 So. 2d 117 (Fla. 1951); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *In Re Wayne*, 4 U.S. D.C. Hawaii 475 (D. Hawaii 1914); *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); *Pledger v. State*, 77 Ga. 242, 3 S.E. 320 (1887); *Ex parte Holliway*, 272 Mo. 108, 199 S.W. 412 (1917); *People ex rel Phelps v. Faucher*, 2 Hun 226 (N.Y. Sup. Ct. 1874); *People ex rel Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (1936); *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124; *Garland v. Torre*, *supra*.

No cases to the contrary are cited in the petition, and since we have been unable to find any we feel justified in saying there is no court of review in any jurisdiction in the United States which has held to the contrary.

III

THE PROPER ADMINISTRATION OF JUSTICE BY THE DISCOVERY AND DETERMINATION OF THE TRUTH IN A JUDICIAL PROCEEDING MUST TAKE PRECEDENCE OVER ANY INCIDENTAL INTERFERENCE WITH THE FREEDOM OF THE PRESS BY REQUIRING THE DISCLOSURE OF NEWS SOURCES.

This is the direct answer to the question we have heretofore presented for the Court's determination of whether certiorari should be granted.

The duty of a person, when summoned as a witness, to attend and testify and the importance of the performance of that duty for the proper administration of justice has been stated as follows:

> "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule:
>
> "1. From the point of view of the *duty* here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may take two forms, either of them serious enough:

"In the first place, it may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to.

"Or the sacrifice may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvience which he may suffer, in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon." Wigmore on Evidence (3rd Ed.) Vol. 8 Sec. 2192 pp. 64-66.

Blair v. United States, 250 U.S. 273, 281-282:

"In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (Wilson v. United States, 221 U.S. 361, 372, quoting Lord Ellenborough), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him (see Brown v. Walker, 161 U.S. 591); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

"But aside from exceptions and qualifications — and none such is asserted in the present case — the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

"He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for

this is no concern of his. Nelson v. United States, 201 U.S. 92, 115.

"On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization.

"He is not entitled to set limits to the investigation that the grand jury may conduct."

This case was cited and approved on the same point in *Blackmer v. United States*, 284 U.S. 421, 438.

As applied to newspaper reporters and the sources of their information it has been said:

Plunkett v. Hamilton, 70 S.E. 781, 136 Ga. 72, 83:

"The citizen or inhabitant owes to the state the duty of testifying, when lawfully called upon to do so, in order that the truth may be ascertained and impartial and complete justice be done. Omitting any reference to instances which are expressly excepted, the law requires a witness to testify, when duly summoned before a court having jurisdiction, and called upon to give competent and relevant evidence. A promise not to testify when so required is substantially a promise not to obey the law. Such promises cannot be recognized, save in subordination to the requirements of the law. If the views sought to be maintained in this case were permitted to prevail, the power to ascertain the truth in judicial investigations, and to administer justice accordingly, would depend, not upon the law of the land, but upon the private promises of secrecy on the part of witnesses, or upon the wishes or orders of their employers. To sustain

such a doctrine would render courts impotent and the effort to administer justice oftentimes a mockery."

In Re Grunow, 86 A. 1011, 84 N.J. Law, 235, 236:

"Such an immunity, as claimed by the defendant, would be far-reaching in its effect and detrimental to the due administration of law. To admit of any such privilege would be to shield the real transgressor and permit him to go unwhipped of justice."

In Re Waque, 4 Hawaii District Court, 475, 476:

"In the opinion of the court, the position of the witness is untenable. Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, — a canon worthy of respect and undoubtedly well founded, it is subject to qualification; it must yield when in conflict with the interest of justice,'— the private interests involved must yield to the interests of the public."

Garland v. Torre, supra, is the only case we have been able to find in which the constitutional provision respecting the freedom of the press was asserted as superseding the general rule that a newspaper reporter is required to divulge the source of his information upon which an article he published was predicated.

In that case Judy Garland, an actress, brought an action against Columbia Broadcasting System on two claims, one for breach of contract and the other alleging that the defendant had made false and defamatory statements about her and had authorized, requested and induced their publication in newspapers and elsewhere. As an example of such a publication she annexed as an exhibit to her complaint a few paragraphs from an article written by Marie Torre and published in a New York news-

paper. In this article Miss Torre attributed to a CBS "network executive" several statements about Miss Garland which, the complaint alleged, were false, defamatory and highly damaging to Miss Garland's professional reputation. CBS denied in its answer the making of the statements or causing them to be published.

In a discovery proceeding Miss Garland's counsel took Miss Torre's deposition. Upon interrogation Miss Torre refused to give the name of the "network executive" who she said had made the statements, "asserting that to do so would violate a confidence."

Proceedings were then brought in the District Court to compel Miss Torre to disclose the name of her informant. Upon her refusal in the presence of the Court to do so, she was held in criminal contempt and she appealed to the Circuit Court of Appeals of the Second Circuit which affirmed the judgment of the District Court.

In its opinion the Circuit Court of Appeals, on the following pages of 250 F. 2d, said:

> "Three alternative arguments are advanced in support of the appellant's position that it was error to require her to disclose in these pre-trial proceedings the identity of a confidential news source. The first contention is a Constitutional one — to compel newspaper reporters to disclose confidential sources of news would, it is asserted, encroach upon the freedom of the press guaranteed by the First Amendment, because 'it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public.' Secondly, it is urged that quite apart from any Constitutional question, the societal

interest in assuring a free and unrestricted flow of news to the public should impel this court to hold that the identity of a confidential news source is protected by at least a qualified privilege. (Pages 547-548)

* * *

"As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news. (Page 548)

* * *

"But freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First-Amendment freedom. (Page 548) * * *

"But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

"It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. (Pages 548-549)

* * *

"Whether or not the freedom to invoke this judicial power be considered an element of Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: '(O)ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.' (Page 549)

* * *

"If an additional First Amendment liberty — the freedom of the press — is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.' * * * This, as Mr. Justice Frankfurter has pointed out in a somewhat different context, 'has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures.' (Page 549)

* * *

"The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned. It has been emphasized

that the tendency should be not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.'"
(Page 550)

Thus, the opinion in this case fully and directly refutes each and every contention in the present petition.

We respectfully submit that there is no distinction between the above case and the one at bar which should impel this Court to grant certiorari here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

DUKE W. DUNBAR,
Attorney General of the
State of Colorado
State Capitol,
Denver 2, Colorado,
Attorney for Respondent.

Of Counsel:
Frank E. Hickey,
Deputy Attorney General,
Richard A. Zarlengo,
Assistant Attorney General,
State Capitol,
Denver 2, Colorado

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